CASE NOS. 18-11931, 18-14163

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

**ADVANCED MASONRY ASSOCIATES, LLC**
**d/b/a Advanced Masonry Systems**

(Petitioner/Cross-Respondent)

vs.

**NATIONAL LABOR RELATIONS BOARD**

(Respondent/Cross-Petitioner)

**A Petition for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board**

**N.L.R.B. Case Nos. 12-CA-176715, 12-CA-221114**

# MOTION TO STAY THE MANDATE PENDING PETITION FOR A WRIT OF CERTIORARI

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-1, Petitioner hereby provides the following Certificate of Interested Persons and Corporate Disclosure Statement:

1. The name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action—including subsidiaries, conglomerates, affiliates, parent corporation(s), publicly traded entities that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case:

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2. The name of every other entity whose publicly-traded stock, equity, or debt may be substantially affected by the outcome of the proceedings:

None.

## MOTION TO STAY THE MANDATE

Pursuant to Federal Rule of Appellate Procedure 41(d), Petitioner respectfully moves this Court to stay issuance of the mandate pending the filing of a petition for a writ of certiorari and the final disposition of that petition by the Supreme Court. Rule 41(d) provides that a court of appeals may grant a stay of a mandate for a period not to exceed 90 days "pending the filing of a petition for a writ of certiorari in the Supreme Court," so long as the movant shows "the certiorari petition would present a substantial question and there is good cause for a stay." Fed. R. App. P. 41(d)(1). Both of those conditions are met here.

### I. The Petition for Certiorari will present a substantial question.

In upholding the Board's conclusions that AMS violated the NLRA by (1) threatening or implying that employees' wages would decrease if they voted to be represented by the Union and (2) discharging employees Luis Acevedo and Walter Stevenson because of Acevedo's Union activity, the Court of Appeals ignored significant evidence that conflicted with the Board's determinations. In so doing, the Court of Appeals clearly "misapprehended or grossly misapplied" the standard of appellate review, i.e., whether there is substantial evidence to support the Board's decision on the record as a whole, thereby mandating the instant Petition for review. See Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 491 (1951).

### A. Substantial evidence does not support the Board's findings that Feliz and McNett threatened wage cuts.

First, the Eleventh Circuit erred in concluding substantial evidence supported the Board's findings that Feliz and McNett threatened wage cuts if the employees elected to be represented by the Union. The claim that Feliz threatened masons with a $4.00 per hour cut in wages if they unionized does not make sense. Feliz just had finished translating a statement from one of the owners of the Company that the market, not AMS, sets pay. Additionally, Feliz's version of events—unlike Acevedo's—was substantially corroborated, by the testimony of Acevedo's co-worker Gerardo Luna, who spoke Spanish and was present during the meeting (A4: 846-50). Luna recalled that, while Feliz "mentioned some things about wages," he "never told us not to vote for the Union," made no threats to employees, and said "nothing about offering extra wages for people who would be with or not with the Union" (A4: 847-48).

Continuing, Acevedo's testimony was impeached convincingly at the hearing, as he twice deviated from a sworn affidavit given during the Region's investigation (A2: 481-86), admitted that he previously (and spuriously) had accused AMS of not hiring him because of earlier physical injuries (A2: 449; A7: 39), and agreed that the Company had opposed his claim for unemployment benefits (A2: 477-79). Finally, Feliz personally was shown to lack anti-Union animus. On behalf of AMS, Feliz hired numerous Union masons, including

Acevedo after Acevedo wrote the Company in 2015 asking for work as "a certified Union mason for over 9 years," an act for which Acevedo later expressed gratitude (A1: 59-61; A2: 408-09; A7: 39).

Similar to the uncorroborated allegation against Feliz, the ambiguous charge against McNett came exclusively from Stevenson, who recalled nothing more about the interaction (A1: 128-30, 145-47). McNett denied making the statement attributed to him (A3: 605-08, 614-15). Rather, he testified that, during a toolbox talk prior to the election, he honestly answered questions by employees. When asked whether AMS had health insurance, he answered that it did, but that he didn't know how it worked, because he had the Union's insurance (A3: 613-14). Similarly, when asked whether the Company had a 401(k) plan, and whether the Company matched employee contributions, McNett replied that AMS did have a 401(k) plan, and used to match, but didn't anymore (A3: 614). Luna was present at this gathering, as well, and remembered McNett saying that the Union had been assessing AMS for benefit contributions for all masons, not just Union masons—a true statement—and urging employees to vote in the election, saying that whether the employees wanted to be Union or not was their option, and would be the product of their private vote (A4: 854-55).

The decision by the ALJ to credit Stevenson over McNett, too, was unreasonable. Stevenson had a limited memory of the discussion. In fact, he

recalled almost nothing more about it (A1: 146-47). Nor was the alleged statement by McNett—who was not shown to have any authority to set wages—objectively coercive. In other words, from the standpoint of a reasonable employee and looking at the totality of the circumstances, the statement, which was isolated expression of opinion purportedly made by a foreman during a safety meeting, could not be construed as a threat by AMS to reduce wages if employees voted for the Union. Stevenson did not testify that he felt intimidated. Compare Shamrock Foods Co., 366 N.L.R.B. No. 117 (2018) (vague statement that having a union "would hurt in the future" unlawful when combined with employer's previous threat of scratch bargaining for wages and benefits).

Moreover, at the time of making the alleged statement, McNett himself was a dues-paying member of the Union who participated in the Union health and pension plans (A3: 605-07). The record does not show that McNett disparaged the Union, regularly or otherwise, although he did relay that two AMS employees under his supervision informed him that the Union, in their opinion, had deceived them into signing up (A3: 607-08). And finally, prior to the hearing, the Union had heard the allegation about McNett indirectly, from Acevedo, but took no action to file or amend an unfair labor practice charge, which indicates that the Union itself did not believe it (A2: 349-52).

### B. Substantial evidence does not support the Board's findings that AMS discharged employees Luis Acevedo and Walter Stevenson because of Acevedo's Union activity.

Second, the Eleventh Circuit erred in concluding that substantial evidence supported the Board's findings that AMS discharged employees Luis Acevedo and Walter Stevenson because of Acevedo's Union activity. The Board found animus in places where not even the ALJ had discerned it: in AMS' alleged decision to change Acevedo and Stevenson's discipline from suspensions to terminations, and in Feliz's "unprecedented and suspicious decision to contact Owners Ron and Richard Karp" in connection with the discipline (A9: 119, at 3). The record shows only that the two employees' suspensions were provisional, pending Feliz's review of training documents gathered by Ramirez. Indeed, it was uncontested that this was Feliz's customary practice. See A1: 99-100 ("the policy [for fall protection violations] is termination pending my review of documents that show that we have, in fact, trained this person").

As for the conversation between Feliz and the Karps regarding the terminations, the record was equally unsupportive. Not only were Ron and Richard Karp not shown to possess anti-union animus, but the sole testimony addressing the content of the discussion—from two of the three people who participated in it—was that Feliz contacted the Karps in an abundance of caution. The ALJ and Board's characterization of the conversation between Feliz and the

Karps, in other words, rested entirely on speculative inferences. It therefore wrongfully was used as support for a finding that AMS violated the Act. TRW, Inc. v. N.L.R.B., 654 F.2d 307, 312 (5th Cir. Unit A 1981) ("[s]uspicion, conjecture and theoretical speculation register no weight on the substantial evidence scale").

Additionally, AMS's explanation for the discharges was not pretextual. Both the ALJ and the Board erroneously credited the testimony of Acevedo and Stevenson that other employees were not tied off correctly on May 16, 2016, yet were not disciplined (A8: 111, at 13 n.44; A9: 119, at 3). The alleged co-violators never were named, or described in any manner which might identify them. Acevedo and Stevenson also contradicted each other, with Acevedo testifying that from his limited vantage point, the column where he was working, "everybody was tied on to the scaffold," and that he had tied himself off by "do[ing] the same thing that everybody was doing," and Stevenson claiming that "nobody had harnesses on that morning" (A1: 154; A2: 424, 469). Amazingly, the Board and the ALJ gave no weight whatsoever to the fact that Acevedo and Stevenson both admitted to lying on May 16 about not having been trained on fall protection.

Further, AMS proved that, regardless of Acevedo's Union membership and alleged activity, it would have fired both Acevedo and Stevenson for their safety violation. The Company introduced extensive evidence of its zero tolerance policy for witnessed fall protection violations. It also introduced extensive evidence of

the training provided to employees on the rule, and showed that the employment consequences of a violation were communicated. Further, AMS introduced evidence from witnesses showing instances where other employees had been terminated for violating the rule (A1: 96-97; A3: 636-38; A7: 48 & 49). Having demonstrated that its safety rule was consistently and evenly applied, then, AMS made a showing sufficient to establish a Wright Line defense. See Northport Health Servs., Inc. v. N.L.R.B., 961 F.2d 1547, 1550 (11th Cir. 1992); DHL Express USA, Inc., 360 N.L.R.B. 730, 736 (2014) ("]i]n order to meet the Wright Line burden, an employer must establish that it has consistently and evenly applied its disciplinary rules"); Contempora Fabrics, Inc., 344 N.L.R.B. 851, 852 (2005) (dismissing 8(a)(3) allegation after employer showed that its discipline "rested upon a consistently enforced policy").

Moreover, the ALJ and Board agreed that the discharges were not comparable because the employees "were each guilty of severe compound violations—failing to anchor their harnesses while simultaneously engaging in another safety violation" (A8: 111, at 19; A9: 119, at 3). The record, however, contains no evidence whatsoever that the Company made or considered such a distinction, or that the distinction exists in policies or practices of the Company, or that the Union or General Counsel even argued such a distinction at the hearing. As a matter of law, it is the employer, not the Board, which is allowed to establish

work rules and the graduations of discipline which accompany violations of those rules. Cf. Performance Friction Corp. v. N.L.R.B., 117 F.3d 763, 768 (4th Cir. 1997) (the Board cannot substitute its business judgment for that of the employer … "the company is entitled to its own assessment of an employee's worth").

The three instances seized upon by the ALJ and Board as proof of selective rule enforcement by AMS either fell squarely under the Company's recognized (and undisputed) exception for non-witnessed violations, or were the product of a mistake subsequently remedied. However, the Board disregarded substantial record evidence, which was unchallenged, by claiming that it lacked merit, or was "convoluted" (A9: 119, at 3). But it is an axiomatic that a party before the Board is entitled to those inferences which the evidence fairly demands, meaning that, rather than expediently dismiss it, the Board must consider testimony that is nether internally inconsistent nor in conflict with the testimony of a credited witness. See generally Allentown Mack Sales & Serv., Inc. v. N.L.R.B., 522 U.S. 378 (1998).

Similarly, the ALJ and the Board each erred by crediting the testimony of Acevedo and Stevenson that other employees were not tied off correctly on the same day as their violation, yet were not disciplined. Vague testimony on the issue of disparate treatment was not limited to former employees, however. A Union representative blithely claimed that employees found not wearing a harness are let

off with a verbal warning "all the time" on AMS jobsites, but couldn't name anyone when asked for specifics (A2: 323-24).

Last, the factual setting of this case itself proves the applicability of Wright Line. While Acevedo was a Union member and supporter, Stevenson was a non-member who displayed no Union support. AMS disciplined both employees for the same rule violation on the same day in the exact same factual circumstances, thus demonstrating consistent rule enforcement. No evidence, whether direct or circumstantial, was put on the record to support the theory—plainly advanced to avoid the legal implication of the uncontested facts—that Stevenson deliberately was terminated to hide the Company's anti-Union animus towards Acevedo. Yet, somehow, the ALJ found just that, a finding that was affirmed by the Board (A8: 111, at 19; A9: 119, at 2-3).

Accordingly, given the overwhelming evidence contradicting the Board's conclusions in this case, the Court of Appeals clearly "misapprehended or grossly misapplied" the standard of appellate review. See Universal Camera, 340 U.S. at 487–88, 491 (stating that the reviewing court must take into account contradictory evidence in the record).

## II. There is good cause for a stay.

Good cause exists to stay the mandate pending a petition for a writ of certiorari because AMS will suffer irreparable harm in absence of the stay.

Without a stay of the mandate, AMS will be required to collectively bargain with the Union before being allowed a full opportunity to seek review in the Supreme Court of the United States. Bargaining will create a relationship between AMS and the Union that is exceedingly difficult to reverse, and will require expenditure of time and resources that will be impossible to recoup. Cf. U.S. ex rel. Chandler v. Cook Cty., 282 F.3d 448, 451 (7th Cir. 2002) (finding that County made showing of irreparable injury sufficient to justify stay of mandate where without stay County would have been required to bear expense of preparing for trial). All of these costs would be unnecessary if the Supreme Court reviews and reverses the decision of this Court. This Court should allow AMS to endeavor to have the Supreme Court overturn the decision with full protection of the status quo while pursuing the legal remedies provided by law.

## CONCLUSION

For the foregoing reasons, this Court should grant a stay of its mandate for ninety days, until November 14, 2019, so that Petitioner is allowed adequate time to prepare and file a petition for a writ of certiorari in the Supreme Court.

## CERTIFICATE OF TYPE SIZE AND STYLE

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in fourteen-point font of Times New Roman.

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 27(d)(2). This motion contains 2957 words, excluding the accompanying documents authorized by Fed. R. App. P. 27(a)(2)(B).

Respectfully submitted,

***s/ Gregory A. Hearing***

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13th day of September, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following: Linda Dreeben, Deputy Associate General Counsel, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C., 20570, Counsel for Appellee.

***s/ Gregory A. Hearing***
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